Case No. 2731

United States
Circuit Court of Appeals
For the Ninth Circuit

ALASKA PACIFIC FISHERIES,
A Corporation,
Plaintiff in Error,
vs.
TERRITORY OF ALASKA,
Defendant in Error.

Reply Brief of Plaintiff in Error

Upon Writ of Error to The United States District Court of The District of Alaska, Division No. 1.

HELLENTHAL & HELLENTHAL,
Counsel for Plaintiff in Error.

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In response to the arguments advanced by counsel for the Territory, the following will be added to what has been said in regard to the various points in the opening brief:

1. *That the Act of the First Territorial Legislature which forms the Basis of the Present Proceeding Creates no Civil Liability.*

Counsel contends that because the fine to be assessed upon the first conviction under the Act is to equal the amount of the license, and because the fine to be assessed upon a second conviction is to be double the amount of the license, and because of the further fact that a judgment may, after conviction duly had, be entered to enforce payment of the fine, the Act creates a civil liability.

Aside from the fact that a law providing for a fine to be imposed upon the conviction of a criminal offense in no sense creates a civil liability, counsel fails to call the attention of the Court to the fact that under the provisions of this Act a third offense is punished not only by a fine, but by imprisonment as well. For the first offense the penalty is a fine equal to the amount of the license, for the second offense the penalty is a fine equal to double this amount, and for the third offense the penalty is a fine equal to three times this amount and imprisonment of not less than thirty days nor more than six months. If these fines may be recovered in a civil proceeding there is no reason why a sentence of imprisonment may not be imposed under this law in a similar proceeding.

Not only is there no difference between a fine and a term of imprisonment in that both are imposed as punishment for an offense under the law and in that neither are assessed to wipe out a civil obligation, but in the present case the liability to both fine and imprisonment arose as the result of the same unlawful act. Here is found at least one of the reasons why the Act of the First Territorial Legislature creates no civil liability and why the Act of the Second Territorial Legislature providing for the enforcement of these fines and terms of imprisonment by a civil proceeding is void.

Since this matter was fully gone over in the opening brief, it will not be further discussed here, except to reply to the further contention of counsel that the provision empowering the Court to enter judgment for the amount of the fine after conviction has the effect of creating a civil liability.

It will be noted that under the Act both natural persons and corporations are upon conviction made liable to fine and imprisonment. It is provided that after a conviction has been had and a fine has been imposed, the defendant may be imprisoned with a view of enforcing the payment of the fine or a judgment may be entered against him which may be collected as other judgments. Of course a corporation could not be imprisoned, so that a fine assessed against it could not be collected or enforced by a threat of imprisonment; accordingly the provision is added providing for the collection of a fine by entering a judgment to be collected as other judgments. The law does not provide that this

judgment may be entered in a civil proceeding, but it provides that this judgment may be entered after a conviction has been duly had and a fine imposed, and after the defendant has failed to pay this fine when imposed. This is not an unusual provision to be found in criminal statutes, and in no case does it create a civil liability. Its effect is merely to provide an additional method for the enforcement of the penalty imposed under the provisions of the act of which it forms a part.

Counsel makes the statement that a statute which merely gives a remedy to enforce an existing right is not retroactive within the meaning of the Constitution. This much is conceded, but it is contended that the Act of the Second Territorial Legislature is not such an act.

In addition to what has been said upon this subject in our opening brief, it may be added that if this act were considered as a valid act the territory would be authorized not only to recover the fine imposed for the first violation, which is the amount of the license, but also the fine and imprisonment imposed for each subsequent violation, since the act provides that each day or part of a day that a person, firm or corporation does business or attempts to do business in violation of its provisions, shall constitute a separate offense, punishable in the case of the first and second offense by fine and in that of the third offense by both a fine and imprisonment. It is not a difficult matter to imagine what the effect would be if counsel's contention were regarded

as correct.

2. *The Provisions of the Act are such That It is Impossible Either To Comply Therewith or to Enforce Them.*

Counsel makes the statement that if the defendant had attempted to comply with the law and found it impossible to do so, or if it were resisting a sentence imposed after conviction, these objections might be admissible of some argument. Counsel does not point out how one engaged in the fishing or mining business could make an attempt in one case to predict the amount of its net income a year in advance, and in the other case the number and kind of cases of fish that he might at a future time be able to catch and can. Nor does counsel point out how a conviction for a violation of the act could ever have been had or how a sentence could ever have been imposed so that anyone could ever be placed in the position of resisting such a sentence. There is no rule of law requiring anyone to attempt the impossible.

Counsel says that in reply to the argument made it is only necessary to say that many persons and corporations, including among the latter the greatest metal producer in the territory, have complied with the law and found no difficulty therein. There is nothing in the record upon this subject, nothing to show that anyone has ever complied with this law. This much is certain, that no one could comply with it unless such a one possessed the gift of prophecy. That some possessed this gift and could, therefore, comply with the law is a

proposition that will be neither admitted nor denied.

Counsel says that the greatest metal producer in the territory has complied with the law. Who this metal producer is we are not advised. All the metal producers in southeastern Alaska, including the great Treadwell mine, are under an agreement with counsel awaiting the decisions in the cases now pending before complying with the demands of the territory. Aside from these there are no metal producers in Alaska except the copper mines to the westward. The owners of these may be gifted with the gift of prophecy, but it would seem unfair to blame the operators of the fisheries and the quartz mines for not being similarly qualified to look into the future. These may, like Tennyson, look into the future as far as human eye can see, but the extent of the income to be derived from as fickle a business as mining, and the extent of a fish pack, depending upon such an uncertainty as one's ability to catch fish, is beyond their range of vision.

Counsel says that all that is necessary under the Act of the Territorial Legislature "is to apply a little common sense and reason to it and it is perfectly easy to see that in the cases in which the amount of tax is made to depend upon the operations of the line of business during the year for which the tax is laid, it shall be calculated and paid at the end of the year, though the Legislature did not expressly so provide." The difficulty with applying this method of payment, however, lies in the fact, not only that the Legislature did not expressly provide for it, but in the further fact that the

Legislature has expressly provided against it.

Section 3 of the Act provides:

> "That any person, corporation or company doing or attempting to do business in violation of the provisions of this Act, *or without first having paid the license therein required,* shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined, etc."

Under this provision, therefore, it will be noted that it is not only necessary to apply for and obtain a license in advance, but also to pay the amount required in advance. If this is not done the person or corporation attempting to do business violates the provisions of the act and becomes subject to the penalties imposed.

In order to follow the suggestion of counsel, therefore, it would not only be necessary to add an additional provision to the act, but also to strike out one or more of the provisions actually contained in the act itself. That all this cannot be done by the application of common sense and reason requires no argument. The reason and common sense should have been applied at the time the act was enacted.

3. *The Act Confers Arbitrary Power upon the Court In Relation To the Matters Indicated In the Opening Brief.*

In reply to the argument advanced in the opening brief upon this proposition counsel says, "To say the least, this is a rather strange objection to come from a defendant that has refused to apply for a license or to pay its taxes when ascertained." This objection may

be strange, but it is equally true that the doctrine that one must comply with a void act before he will be heard to assert its invalidity, has a very unfamiliar ring to it. Counsel's contention is that one is estopped from questioning the validity of a law unless he has first complied with it. It is but necessary to state this proposition in order to refute it.

Nor can very much blame be attached to a mining or fishing concern for not paying the amount of its license taxes at the end of the season when they can be ascertained. In the case of the mines they cannot be ascertained until the close of the year, and in the case of the fisheries they cannot be ascertained until the close of the fishing season. In order to pay the taxes when ascertained, therefore, the mining or fishing concern would be obliged to pay the amount of the license for the first day's violation, double the amount for the second day's violation, three times the amount for the third day's violation, and in addition to this, surrender itself to suffer imprisonment for a period of not less than thirty days nor more than six months, and these cumulative fines and terms of imprisonment would have to be calculated by considering each day in the year a separate offense in the case of the mines, and each day composing the fishing season a separate offense in the case of the fisheries. The fact that the Territory in bringing these actions has confined itself to a demand for the penalty imposed for the first day's violation does not alter the fact that in addition to this penalty the defendant is under the law also liable to all the other

cumulative penalties. Nor would a payment of the amount demanded in these actions wipe out the criminal liability resulting from a violation of the act. Nowhere is it provided that this would be the result, nor is anyone given the power to compromise these crimes.

Counsel says: "No such difficulty or objection has ever arisen under the Act of Congress, and indeed could not arise." This statement of counsel is quite true, and the reason for it is that the act of Congress referred to does not contain the provision to which this objection is made. The first paragraph of the Act of the Territorial Legislature was copied from the Act of Congress relating to license taxes, but the paragraph conferring this arbitrary power upon the Court or Judge was not copied from that act but was copied from the Act of Congress relating to licenses for the sale of intoxicating liquors. The Act of Congress relating to the sale of intoxicating liquors is published as Section 2572 of the Compiled Laws of Alaska and is as follows:

> "That the licenses provided for in this Act shall be issued by the Clerk of the District Court or any sub-division thereof, in compliance with an order of the Court or Judge thereof duly made and entered, and the Clerk of the Court shall keep a full record of all applications for licenses and of all recommendations for and remonstrances against the granting of licenses and of the action of the Court thereon."

Section 2 of the Act of the Territoral Legislature is a copy of the section just quoted and was not copied

from any provision contained in the Act of Congress relating to licenses in connection with trades or business.

In order to refute the statement of counsel that the Court in issuing a license under this provision is performing a mere ministerial act and has no function to perform upon the tendering of the money except to issue the license, it is but necessary to call attention to the language of the provision. Under it the Court or Judge does not issue the license at all. The license is issued by the Clerk. The Clerk is made the ministerial officer by whom the ministerial duties are performed; but he cannot act until the Court or Judge has made an order.

The act provides for action by the Court, but this action is based upon recommendations and remonstrances. Since this matter was fully discussed in our opening brief it will not be further referred to here.

4. *That the Tax Sought to be Collected does not Conform to the Requirements in the Organic Act Relating to Uniformity and Assessment According to Value.*

According to the contention of counsel for the Territory in the discussion of this matter, the fact that the authority of the Legislature is extended to all rightful subjects of legislation gives the Territorial Legislature a right to impose and collect license taxes regardless of the other provisions and limitations contained in the Organic Act itself. If the provision extending the power of the Legislature to all rightful subjects of legislation stood alone, and no limitations were imposed upon the taxing power, it must be conceded that any tax not laid

in violation of the provisions of the Federal Constitution could be imposed and collected. But such is not the case in Alaska. While the authority of the Legislature extends to all rightful subjects of legislation, it is expressly provided that "All taxes shall be uniform upon the same class of subjects, and shall be levied and collected under general laws and the assessment shall be according to the actual value thereof."

The effect of this provision in the Organic Act and the decisions relating to similar provisions contained in the various state constitutions, have been fully discussed in our opening brief. To the arguments there advanced and the authorities cited and discussed counsel makes no reply. The brief of counsel contains the bald statement "And as a matter of fact the provision quoted from Section 9 of the Organic Act has absolutely no application to license taxes." No reason is assigned for this statement and no authorities cited except a quotation from Cyc., which contains the following:

> "The principle of equality and uniformity does not require the equal taxation of all occupations or pursuits nor prevent the legislature from taxing some kinds of business while leaving others exempt, or from classifying the various forms of business, but only that the burdens of taxation shall be imposed equally upon all persons pursuing the same avocation, or that, if those following the same calling are divided into classes for the purpose of taxation, the basis of classification shall be reasonable and founded on a real distinction and not merely

arbitrary or capricious. To this extent also, and no further, the principle applies to license fees or taxes imposed under the police power for the better regulation of occupations supposed to have an important public aspect."

While a general statement from a text book based upon the decisions of the state courts with reference to the meaning of the limitations upon the taxing power found in the state constitutions can have but little value in considering the effect of the limitation upon the taxing power contained in the Alaska Organic Act, because these limitations as found in the state constitutions are in all cases, as has been pointed out in the opening brief, widely different from the limitation found in the Alaska Organic Act, it will be noted that the quotation from Cyc referred to in the brief of counsel for the Territory and above quoted states in express terms that these limitations are applicable to license taxes, and cannot, therefore, be relied upon as any authority for the statement of counsel that they are not so applicable.

Counsel also refers to the case of Binns vs. The United States, but in that case none of the questions here involved were before the Court. The only question there was whether Congress could collect a tax in the Territory that was not uniform throughout the United States, and it was held by the Court that because this was a local tax levied for the purpose of meeting the expense incident to the administration of the law in the Territory it did not come within the inhibition "That all duties, imposts and excises shall be uniform through-

out the United States." None of the questions presented in this case were before the Court in that case. If the decision in that case has any bearing upon the issues in this case whatsoever it is upon the point that these license taxes are taxes within the meaning of that term when used in the Constitution. Say the Court upon that point:

> "We shall assume that the purpose of the license fees required by Section 460 is the collection of revenue and that the license fees are excises within the constitutional sense of the term. Notwithstanding we are of the opinion that they are to be regarded as local taxes imposed for the purpose of raising funds to support the administration of the local government in Alaska."

5. *Relating to the Argument of Counsel that License Taxes are Expressly Provided for in the Organic Act.*

The Organic Act contains the provision "That this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses."

The language quoted is part of a provision limiting the power of the Legislature in relation to the modification and repeal of certain laws in force at the time the Organic Act was passed. Its effect was fully discussed in our opening brief. It was there pointed out, first, that the provision quoted was not a grant of powers at all, and second, that even if viewed as an express grant of powers, it did not confer the right to impose a license tax, in that the power to license conferred authority only

to exact a license in connection with regulations imposed under the police power, and the authorities bearing upon that question were cited and discussed.

In addition to what was there said, attention is directed to the following provision contained in Section 9 of the Organic Act:

> "No tax shall be levied for territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; nor shall any incorporated town or municipality levy any tax for any purpose in excess of two per centum of the assessed valuation of property within the town in any one year."

It will be noted that the extent to which the taxing power can be exercised by either the Territorial Legislature or the municipalities is clearly defined and limited by the Organic Act. While these provisions are limited to the taxation of property within the territory in the one case, and the taxation of property within the municipality in the other case, this reference to property was made necessary to indicate that the power of the Legislature to levy taxes extended to all property within the territory, while that of the municipality extended to such property only as was situated within the municipality. The object of the provision is clearly to limit the power of taxation; not the power of levying taxes on property only, but taxes. Its purpose is to prevent over-taxation. Clearly, Congress would not so jealously guard property against over-taxation and leave industry without any protection whatsoever.

If counsel's contention in this regard is correct, Congress expressly protected idle property against overtaxation while it expressly provided that those engaged in producing wealth might be taxed in whatever sum the Legislature might feel inclined to exact. Independent of all other considerations, therefore, this provision in the Organic Act clearly indicates that it was the intention of Congress that the taxing power of the Territorial Legislature should be limited to a tax of one per cent on the assessed valuation of property in the Territory, while that of the municipality should be limited to a tax of two per cent on the assessed valuation of property in the municipality, and that no other or further taxes should be assessed.

But, as has already been indicated in the opening brief, the power to license does not carry with it the power to tax, but merely the power to require a license in connection with the regulations imposed under the police power. A license tax, if it can be required and exacted at all, must be exacted under the taxing power, and this power is by the Organic Act made subject to certain fixed limitations.

In justification of the law enacted by the Territorial Legislature counsel says that the population of Alaska is largely centered in the neighborhood of towns, and that ninety-nine per cent of the taxable property of the territory, excluding fishing and mining, is within the incorporated towns, and that the Legislature, with the express view of exempting property in the incorporated towns from taxation for territorial purposes, laid this

license tax on mining and fishing. The excuse counsel offers for this is that the municipalities were already taxed for municipal purposes, and that it would cost more money to collect a property tax than a license tax.

In discussing the effect of this law in the opening brief it was assumed that the Legislature acted fairly, and that it was not the purpose of the Legislature to collect taxes from the mining and fishing industries alone, but that this result followed accidentally. Now comes counsel and advises the Court that it was the result of premeditation, that the mining and fishing industries were selected to pay the expense of the territorial government in order that other property might not be called upon to bear any part of the burden. The excuse that municipalities were already taxed is a very lame one. Municipalities throughout the United States are taxed for municipal purposes, yet everywhere property within these municipalities bears its just proportion of the expenses incident to the administration of the state governments, and counsel forgets that the mines and fisheries were already taxed before the enactment of this law, under the Act of Congress. He also forgets that the moneys collected under the Act of Congress as license taxes from those residing within the incorporated towns is turned over by the Federal government to the municipalities to be expended for municipal purposes, so that those residing within the municipalities and paying the license taxes receive the benefit of the taxes so paid, while the taxes paid by the mines and the fisheries situate outside of the incor-

porated towns are, in the main at least, turned into the general Alaska fund. Again he forgets that some of the fisheries, at least, are situate within the incorporated towns. Petersburg, Fort Wrangel and Ketchikan have within their boundaries at least one or more salmon canneries, while Juneau and Sitka have within their boundaries cold storage fish plants, and this may be true, so far as is known, of other municipalities.

If the statement of counsel is correct that the mines and fisheries were taxed for the express purpose of relieving property within the towns of taxation, it is reasonable to assume that the exemption of five thousand dollars in the case of mines was made for the express purpose of relieving the placer mines from taxation, throwing the entire burden on the quartz mines and the fisheries. For this is the effect of the act, as was pointed out in the opening brief.

Nor is the point made by counsel, that the expense of levying a property tax would be greater than that of levying a license tax, a valid one. Under the conditions mentioned, that ninety-nine per cent of the property is situated within the incorporated towns, where it has already been assessed, it would not be a difficult matter to assess this property in connection with the levying of a tax for territorial purposes. It might be more expensive the first year than the collection of a license tax, but this additional expense would be slight and would not be any excuse for the imposition of an unjust and unequal tax laid upon the mines and fisheries alone.

The statement of counsel that the salmon industry produced somewhere in the neighborhood of twenty million dollars is more or less misleading. While the selling price of the product might have been this much in a single year, this product is composed not only of the fish, but it contained the tin, lumber, labor, and all kinds of material that composed the finished product, and the fish canned form a comparatively small item in calculating the total cost of the product. According to the statement of counsel it was not the purpose of the Territorial Legislature to tax the fishing industry at all, but the object of the tax was to sell the fish. By what authority the Legislature acted in the selling to the fisheries the fish found in the waters of Alaska is not stated.

That the fisheries and the mines should pay their just proportion of the expense incident to the administration of government in Alaska cannot be denied, but it is unfair and unjust to cast the entire burden upon these industries. An ad valorem property tax would distribute the burden of taxation equally, and would in all respects comply with the requirements of the Organic Act and the Federal Constitution.

Respectfully submitted,

HELLENTHAL & HELLENTHAL,

Attorneys for Plaintiff in Error.